BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
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Boathouse Posing as Aerodrome Doesn't Pass Muster

Justice O'Neill of the Ontario Superior Court recently released his decision in *Seguin (Township) v. Bak*, in which the Township sought a mandatory order forcing the respondent to tear down a structure he had erected over the water's edge on Lake Rosseau. The structure had been built contrary to a stop work order from the Township. At issue in the application was whether the structure was a boathouse, allowing the Township to intervene in its construction, or whether it was a federally regulated water aerodrome, which would be outside of municipal jurisdiction.

Before considering Justice O'Neill's analysis it's worth reviewing the facts surrounding this case. The respondent, Mr. Bak, is a longtime developer who purchased a recreational property on Burgess Road with shoreline frontage on Lake Rosseau in April of 2008. Mr. Bak was neither the owner of a plane, nor a pilot. When he purchased the property it was his intention to tear down the old cottage, build a new cottage and construct a single storey boathouse. After the purchase was completed, Mr. Bak did indeed demolish the existing cottage and replaced it with a larger one. He also sought to acquire the shore road allowance from the Township to construct the boathouse.

In August of 2008 Mr. Bak applied for a zoning amendment as the Township's by-laws prohibited the construction or installation of in-water shoreline structures in an Environmental Protection (EP) Zone. In his application, Mr. Bak stated that, "I seek to change the boundary of the EP zone along the shoreline to permit a future boathouse". The application for amendment was refused in November of that same year, and in December the respondent filed an appeal with the Ontario Municipal Board (the "OMB").

In November of 2009, Mr. Bak applied to purchase the road shore allowance, and subsequently withdrew his appeal to the OMB when the Township determined not to process acquisition until after the appeal had been concluded. During the hearing of the application before Justice O'Neill, the respondent submitted that it was at this time that he turned his attention to building an aerodrome as he was satisfied that he could not build a boathouse. In March of 2010 the shore road allowance transfer was approved.

Between November 2010 and January 2011 the respondent's designer, Mr. Smith, finalized design drawings for the proposed structure, which called for a 1.5 storey building with two bedrooms and over 1,000 square feet of living space above a structure having an entrance of 40 feet wide by 12 feet high to accommodate a plane. It is worth noting, as the court did, that had Mr. Bak been successful on his OMB appeal, he would have been limited to a 1-storey boathouse.

In February of 2011, Mr. Bak and the Township completed a Site Plan Agreement, which provided that there would be "no further development or expansion of the buildings, structures, parking areas and fire pits except in accordance with the Township's Site Plan Control By-Law and this Agreement". After Mr. Bak completed the sale of the shore road allowance in May of 2011, Mr. List wrote to Transport Canada informing the agency of the construction of an unregistered aerodrome. Construction of the dock structure for the proposed aerodrome, which was within the EP Zone, began in July 2011. As a result of the construction, the Township issued a stop work order. In response to the order, respondent's counsel informed the Township that as the construction pertained to a federally regulated structure, the order was of no effect and would be ignored. By January of 2012 the structure was substantially complete, and in February the Township brought its application to the Superior Court.

No party contested that aviation is within the sole ambit of federal regulation, or that if Mr. Bak was correct about having built an aerodrome rather than a boathouse the structure would be outside of the jurisdiction of the Township. The sole issue to be determined by the court was whether the 1.5-storey structure was indeed an aerodrome, or whether it was just a boathouse with a big door. As noted by Justice O'Neill, the *Aeronautics Act* defines an aerodrome as "any area of land, water (including frozen surface thereof) or other surface used, designed, prepared, equipped, or set apart for use either in whole or in part for the arrival, departure, movement or servicing of aircraft and includes any buildings, installations and equipment situated thereon or associated therewith". Private aerodromes are governed by a permissive regime that does not require prior federal authorization for the location, but once the aerodrome is registered with the Ministry of Transport, it is subject to federal regulation and safety standards.

In determining whether the structure was in fact a private aerodrome, Justice O'Neill considered some of the salient facts surrounding this case. He noted that it was the respondent's intention from the outset to build a boathouse, that the respondent's designer did not undertake any investigation about plane sizes, and that the structural engineer who prepared the dock, which was also the structure's foundation, had no input into its size or functional use as an airplane hangar. Also, the structure as built had only a 38 foot wide door and an entrance height of under 10 feet—meaning it could not fit a

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Boathouse *(cont'd)*

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small Cessna. The structure had been photographed in use as a boat house in June and August of 2012, and had been advertised and rented to tenants as a "boathouse" that summer. Finally, the application to Transport Canada to register the structure as an aerodrome was not received until May 16, 2012, which was after the Township had filed its application.

Next, Justice O'Neill referenced an excerpt from the *Canadian Owners and Pilots Association Guide to Private Aerodromes*, which warned that it is "imperative" that a facility be strictly used for aeronautics and not be of mixed use if it is to be federally regulated, and that mixed use buildings may require municipal building permits.

Finally, Justice O'Neill reviewed the relevant jurisprudence, noting first the decision in *Mississauga (City) v. Greater Toronto Airports Authority*, which held that aerodromes were essential to the subject matter of aviation. However, in distinguishing this case from *Mississauga*, Justice O'Neill also referenced the Alberta Court of Appeal's decision in *Taylor v. Alberta*, where the Court held that, unlike a case such as *Mississauga* where the intended use of all proposed buildings was known, it was impossible to determine what was integral to aviation without knowing the intended use of the planned structures. The last case considered by Justice O'Neill was a decision of the Ontario Superior Court of Justice in *2241960 Ontario Inc. v. Scugog (Township)*, a case involving a commercial landfill site whose owners eventually intended to turn it into an aerodrome, but sought to escape municipal jurisdiction in the interim. In that case it was held that regardless of whether it was the applicant's possible future intention to operate an aerodrome, it was currently engaged in operating a landfill and so was subject to municipal oversight.

Applying the *Scugog* reasoning to this case, Justice O'Neill concluded that, although it was true that the respondent built a structure and registered it as a water aerodrome with Transport Canada, the "inescapable" conclusion was that it was intended to be, and was built, as a boathouse. While the structure could accommodate a small ultra-light plane, in every other way it looked like, functioned as, and had been used as a boathouse. He had no choice but to conclude that the construction was at its core the construction of a boathouse and subject to Township zoning and planning by-laws. He concluded by stating that to find otherwise would result in a litany of "water aerodromes" being built, that were not subject to environmental oversight and that operated for all intents and purposes as boathouses.

Seguin (Township) et al v. Bak,
2013 ONSC

Air New Zealand Trademark Narrowed

At the request of a Cassels Brock & Blackwell LLP ("Cassels"), a Canadian law firm (presumably acting on behalf of one if its clients), the Registrar of Trademarks was asked to issue a notice under s. 45 of the *Trademarks Act*, R.S.C. 1985, c. T-13, which would require Air New Zealand to demonstrate that its "AIRPOINTS DOLLARS" trademark (the "Mark") has been used in Canada in the prior three year period. If it has not been so used, Air New Zealand ("ANZ") as the registrant for this trademark would be required to explain the reason for such lack of use.

The Mark had been registered in association with the following services:

> Financial management; providing, storing, collating and recording financial information; electronic funds transfer; services provided by airlines, in the nature of frequent flyer programmes and other incentive programmes; membership privileges and loyalty recognition programmes in the nature of travel services.

> ***… the [AIRPOINTS terms and conditions] make reference to the Mark in association with accumulating and redeeming points for rewards such as flights, hotel bookings and car rental services, all of which I am satisfied are representative of the Frequent Flyer Services.***

The above-referenced notice was issued and, as a result, ANZ submitted documentation, through its in-house counsel, supporting its use of the Mark, including:

- a printout from the Whois.Net domain name database showing ANZ as the owner of the domain name for the ANZ website since 2005;
- printouts from the ANZ website relating to the "Terms and Conditions of Airpoints Membership" The printouts provided details with respect to the operation of the Airpoints program and benefits;
- a Google Analytics report for the ANZ website, showing web traffic for the relevant period;
- five statements delivered to Airpoints Dollars members showing the balance of their AIRPOINTS DOLLARS — only one of which was addressed to a Canadian address; and
- a list of six names and mailing addresses, being a representative sample of Canadian based AIRPOINTS DOLLARS members.

After considering this evidence, the Registrar of Trademarks found that, at best, the Mark was used only in connection with "services provided by airlines, in the nature of frequent flyer programmes and other incentive programmes."

In response, Cassels argued first that airline frequent flyer points are not properly characterized as "services provided by the airline" and, as such, the registration by ANZ should be invalidated. The Registrar rejected this argument, holding that the distinction made by Cassels was too restrictive.

Cassels also argued that the ANZ registration of the Mark should not be upheld because the "services" were not performed in Canada. Again, the Registrar disagreed. It held that, although the evidence of use in Canada was not extensive, the terms and conditions relating to the accumulation of AIRPOINTS allow members to collect these points when travelling to and from Canada on Air Canada and any other partner airlines. The Registrar also noted the Mark appeared on AIRPOINTS statements — at least one of which was directed to an address in Canada. As a result, the Registrar ruled that the "services" were, indeed, performed in Canada.

The Registrar also noted that the ANZ website invited visitors to "Register Now". Although it is not clear whether anyone signed up for the service, the Registrar did conclude that the ANZ website was viewed in Canada, meaning that the service was advertised and available to be performed in Canada.

In the end, the Registrar did uphold the portion of the original scope of the mark relating to the use of the Mark with respect to frequent flyer and incentive programmes, but balance of the scope of the Mark was disallowed.

The Registrar re-defined the scope of ANZ's Mark to include only:

> "Services provided by airlines, in the nature of frequent flyer programmes and other incentive programmes Membership privileges and loyalty programmes in the nature of travel services."

Re Air New Zealand,
2013 TMOB 123

Tour Company Refused Services for Discriminatory Reasons

Senior Tours Canada Inc. ("Senior Tours") is a travel company that specializes in delivering group tours to seniors. A human rights complaint was filed against Senior Tours under Ontario's *Human Rights Code* by Donna Austen, in which she alleged discrimination with respect to goods, services and facilities because of disability.

It was common ground that in January of 2012, after the applicant contacted the respondent to request a brochure, Senior Tours sent the applicant a letter stating that it was refusing any further services to her because "her needs and expectations exceed the level of service we can provide."

What was in dispute between the parties, and left to the Human Rights Tribunal of Ontario to decide, was the reason for these actions. The applicant alleged that her disabilities, which included claustrophobia and irritable bowel syndrome, were a factor in the respondent's decision to decline additional services to her. Senior Tours, on the other hand, maintained that this decision had nothing to do with any disabilities and that it was made because the applicant's behaviour was so unpleasant and combative that it no longer wanted to deal with her.

The respondent did not retain counsel to make submissions before the Tribunal. The Adjudicator described at some length the various deficiencies in the case put forward by Senior Tours.

In particular, the decision notes that a case management conference call was convened one month prior to the hearing, after Senior Tours filed documents indicating that the only witness it intended to call was its general manager. The Adjudicator noted that it appeared on the face of the submissions that the general manager did not have any personal knowledge of some of the events at issue and that her evidence was likely to consist largely of hearsay.

After explaining that hearsay evidence, while admissible at the Tribunal, is usually given less weight than credible direct oral evidence subject to cross-examination, the Adjudicator indicated that Senior Tours could call additional witnesses if it provided witness statements to the applicant and Tribunal by a certain date. Ultimately, Senior Tours proceeded with the general manager as its only witness.

It was the position of the respondent that the decision to cease any further dealings with the applicant was made long before the events of January 2012 that precipitated the complaint to the Tribunal. In addition, Senior Tours contended that its experiences with the applicant in 2008 and 2009 were relevant as similar fact evidence: the evidence of these earlier interactions is consistent with its evidence about the applicant's combative behaviour in January 2012.

In May 2008, the applicant travelled to England on a Senior Tours holiday. Early in the tour, the applicant threw her back out and required medical attention. The two parties had quite different accounts of what occurred as a result, including with respect to the timing of events, whether an "emotional scene" occurred at a hospital, and who paid for taxi fare to and from the hospital.

On all counts, the Adjudicator found the applicant's evidence to be more credible than the respondent's. In support of her version of events, the applicant tendered documentary evidence, including receipts and her own testimony, which was not challenged through cross-examination. The evidence of Senior Tours was pure hearsay – the general manager testified as to her understanding of what happened in May 2008, but had no personal knowledge of those events. She made reference to documents and notes in the possession of Senior Tours, but none of these were tendered as evidence.

As a result, the respondent's contention that it was determined in 2008 that the applicant "was not suited to group travel" because she refused to pay for things she was responsible for and was too demanding was rejected by the Tribunal.

Similarly, the Adjudicator did not find the evidence of Senior Tours about a March 2009 phone call from the applicant to be credible. The applicant called the respondent to notify it of a change of address. Again, the general manager had no personal knowledge of this phone call, but testified that it was her understanding that the applicant yelled at and was abusive toward the Senior Tours employee who took the call. And, again, she referred to various documents on which her understanding was based, but did not offer these documents as evidence.

With that backdrop, it is perhaps not surprising that the Adjudicator again preferred the evidence of the applicant with respect to what occurred when, in January 2012, the applicant made a series of phone calls to the respondent to ask for a copy of the brochure for a tour she was interested in joining. The applicant testified that she told the respondent that she has irritable bowel syndrome and claustrophobia and that for these reasons, she required an aisle seat near the front of the plane when flying.

The respondent contended that the applicant did not disclose that she has multiple disabilities that require accommodation when travelling. Further, it submitted that the applicant was demanding and argumentative on the phone calls, in line with its version of her behaviour in 2008 and 2009. None of this was accepted by the Tribunal, with the Adjudicator pointing out yet more discrepancies and deficiencies with the evidence called by Senior Tours.

While the applicant did not have much in the way of documentary evidence to substantiate her diagnoses, the Tribunal found that her testimony was sufficiently credible to establish that she has irritable bowel syndrome and claustrophobia and, therefore, is a disabled person under the Code. It was also found that the applicant's disclosure of her disabilities was a factor in the respondent's refusal to provide travel services.

Senior Tours raised in its submission the fact that it has no control over airlines' seating policies, which state explicitly that particular seats cannot be guaranteed. The Tribunal found that this did not mean that there were no steps that the respondent could take – including separating out air travel from the land-based portion of the tours, allowing the applicant to book flights individually (which is an option specifically referenced in the respondent's own Terms and Conditions) – and that its refusal to provide services constituted a violation of the Code.

The Tribunal awarded the applicant $5,000 as compensation for injury to dignity, feelings and self-respect, after reviewing other awards in similar cases. When compared to other cases, a reduced award was deemed appropriate because, unlike in those other cases, there was no element of public shaming here. The Tribunal refused to order that Senior Tours develop a human rights policy because it had developed one since the filing of the application.

We have no information, credible or otherwise, as to the applicant's future travel plans.

Austen v Senior Tours Canada Inc.,
2013 HRTO 1417

End of the Line *(Wet Leasing)*

On August 30, 2013, the Canadian Transportation Agency (the "Agency") released its new policy on wet-leasing. For the uninitiated, in the context of this policy, wet leasing involves the leasing of aircraft together with a crew by a Canadian air carrier from a foreign air carrier for use by the Canadian air carrier as part of its own operations. A wet lease can include the whole crew, or just the flight crew.

Traditionally, wet leases have been used to address under-capacity in a Canadian carrier's fleet due to technical or mechanical issues. Wet leasing is also used to provide additional capacity to Canadian carriers during peak seasons.

There have historically been a few concerns with the way in which wet leases have been used. Some have argued that the training of the foreign crews may not be up to Canadian standards and that these arrangements take skilled jobs away from Canadians. Others have argued that wet leasing is a mechanism that has been improperly utilized as a mechanism to skirt Canadian ownership requirements imposed on Canadian air carriers.

In Canada, wet leases of the sort contemplated in the new policy must be approved by the Agency pursuant to s. 60 of the *Canada Transportation* Act, S.C. 1996, c. 10, and the Agency is required to ensure that all such wet leases meet the requirements set out in s. 8.2 of the *Air Transportation Regulations* (SOR/88-58).

The key changes are that, in order for the Agency to approve wet leases:

- the number of aircraft leased by a Canadian operator is capped at 20% of the number of Canadian-registered aircraft on the lessees' Air Operator Certificate at the time the application was made;
- small aircraft are excluded from the number of Canadian-registered aircraft described above; and
- small aircraft are defined as aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of not more than 39 passengers.

In addition to the above, the lessee is required to provide a rationale as to why the wet lease arrangement (or its renewal) is necessary.

The Agency has stated that:

- it will strictly apply the 20% cap;
- it will require fixed-term durations, i.e. not open ended arrangements;
- it will not deny an application solely on the basis of the rationale for the use of foreign aircraft with flight crew, as long as the cap is not exceeded;
- it may renew approvals of wet-lease applications of more than 30 days as long as the cap is not exceeded;
- there is some flexibility for short term arrangements and where unexpected events require an exception; and
- if Canadian air carriers cannot enjoy reciprocal opportunities to wet-lease in a foreign jurisdiction, the Agency should condition or deny an application involving a lessor from that jurisdiction.

The new policy will be applied to all applications currently in existence with a term of 30 days or more, in addition to all new wet lease approval applications received commencing on August 30, 2013.

The following will not be subject to the new policy:

- all-cargo services, irrespective of the nationality of the carriers;
- applications with durations of 30 days or less which are not renewed, irrespective of the nationality of the carriers;
- wet leases for use on a domestic service;
- applications between two licensed Canadian carriers;
- applications between two foreign carriers; or,
- applications between a foreign licensee and a Canadian lessor carrier.

They Agency has undertaken to publish a wet leasing guide for use by the industry. It also undertook to provide an opportunity for comment before the guide is finalized.

See: *https://www.otc-cta.gc.ca/eng/publication/notice-industry-canadas-policy-wet-leasing*

Gerard Chouest
(416) 982-3804
chouest@lexcanada.com

James P. Thomson
(416) 982-3805
jthomson@lexcanada.com

Carlos Martins, Editor
(416) 982-3808
cmartins@lexcanada.com

Tae Mee Park
(416) 982-3813
tpark@lexcanada.com

Andrew MacDonald
(416) 982-3830
amacdonald@lexcanada.com

Elliot Saccucci
(416) 982-3812
esaccucci@lexcanada.com

BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
BARRISTERS, SOLICITORS

33 Yonge Street Suite 201,
Toronto, Ontario, CANADA
Phone: 416 982-3800
Fax: 416 982-3801

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